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February 6, 2017

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 14-50

Dear Ms. Dortch:

On February 3, 2017, Joint Reply Comments of Bonneville International Corporation and The Scranton Times, L.P. (the "Reply Comments") were timely filed in MB Docket 14-50, *et al.* via ECFS. The version of the Reply Comments filed on February 3, 2017, inadvertently did not include a Certificate of Service. The attached Reply Comments include a Certificate of Service which indicates that the Reply Comments have been sent today by first class mail and by email to the parties listed on the certificate.

Please contact the undersigned if you have any questions regarding this matter.

Very truly yours,

Derek Teslik
Counsel to Bonneville International Corporation
and The Scranton Times, L.P.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review –	)	
Review of the Commission's Broadcast	)	MB Docket No.14-50
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
2010 Quadrennial Regulatory Review –	)	MB Docket No. 09-182
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
Promoting Diversification of Ownership	)	MB Docket No. 07-294
In the Broadcasting Services	)	

JOINT REPLY COMMENTS OF
BONNEVILLE INTERNATIONAL CORPORATION
AND THE SCRANTON TIMES, L.P.

Bonneville International Corporation ("Bonneville") and The Scranton Times, L.P. ("Scranton") (collectively "Bonneville/Scranton") hereby submit reply comments in support of the National Association of Broadcasters' Petition for Reconsideration ("NAB Petition") in the above-referenced proceeding and in rebuttal to the Opposition filed by the Office of Communication of the United Church of Christ, Inc., *et al*. ("UCC Opposition") in the same proceeding.[1] This reply is limited to the pressing need for elimination of the 42-year-old newspaper/radio cross-ownership ban, although Bonneville/Scranton strongly supports the

[1] National Association of Broadcasters, Petition for Reconsideration, MB Docket No. 14-50, *et al.* (Dec. 1, 2016); United Church of Christ, Inc., *et al*., Opposition to Petitions for Reconsideration, MB Docket No. 14-50, *et al.* (Jan. 24, 2017).

jettisoning of the entirely outdated – and now counterproductive – newspaper/broadcast cross-ownership ("NBCO") rule as a whole.

It is becoming increasingly difficult to quantify the number of times that the Commission has acknowledged that the newspaper/radio rule does not demonstrably serve any of the agency's three identified policy goals but has nonetheless retained the restriction, with little or no empirical support. By Bonneville/Scranton's count, the Commission's decision in the 2014 Quadrennial Regulatory Review's *Second Report and Order* ("*Second R&O*") marks at least the eighth time that the FCC has avoided taking action consistent with its own fact-based observations over the years.[2] Bonneville/Scranton agrees with NAB that the Commission has again refused to grapple with relevant evidence in the docket that undermines or contradicts the FCC's retention of the ban, and it is disturbing that a majority of commissioners reportedly would have supported elimination of the rule – yet the ban still survives.[3] Moreover, UCC's implicit claim that radio is uniquely positioned to "inform" its audiences, particularly communities of color, about important issues was rebutted by contrary evidence Bonneville/Scranton submitted in the record.[4] The *Second R&O* simply ignores that rebuttal evidence.

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[2] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order*, 31 FCC Rcd 9864 (2016) ("*Second R&O*"). An accounting of the FCC's earlier doubts about the efficacy of the ban is available in numerous Bonneville/Scranton filings in the consolidated dockets. *See, e.g.*, Joint Comments of Bonneville International Corporation and The Scranton Times, L.P., MB Docket No. 09-182, et al., at 6-9 (Mar. 5, 2012) ("2012 Comments").

[3] *See Second R&O*, 31 FCC Rcd at 10045-58 (Dissent of Commissioner Pai); *id*. at 10059-62 (Dissent of Commissioner O'Rielly).

[4] *See* Bonneville/Scranton Ex Parte, MB Docket No. 14-50, at 2-3 (July 27, 2016) ("Bonneville/Scranton July 2016 Ex Parte").

The Commission should not allow this flawed regulatory history to continue. Rather than struggle to justify its most recent decision to an increasingly skeptical U.S. Court of Appeals for the Third Circuit, the FCC should repeal the newspaper/radio rule once and for all.

I. OPPONENTS FAIL TO REBUT PETITIONERS' SHOWING THAT THE FCC'S FLIMSY RATIONALE FOR PRESERVING THE NEWSPAPER/RADIO CROSS-OWNERSHIP BAN IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO ITS SECTION 202(H) OBLIGATION

The UCC Opposition's attempt to prop up the Commission's re-adoption of the newspaper/radio cross-ownership ban is even more threadbare than the *Second R&O*'s own discussion of the issue. UCC devotes just two paragraphs to defending the NBCO ban, and it never explicitly refers to the newspaper/radio rule at all.[5] That approach allows UCC to side-step serious analysis of whether and how the newspaper/radio rule advances any of the FCC's long-articulated goals for the restriction. Evidence in the record, however, reveals that the newspaper/radio cross-ownership ban does not serve any of them:

- **Competition** – The FCC long ago concluded that daily newspapers and broadcast stations are not rivals in a competitive analysis sense, and the Third Circuit has repeatedly endorsed that finding.[6] The *Second R&O* reaffirms that conclusion.[7]
- **Localism** – The Commission for years has recognized that the newspaper/radio rule (and the entire NBCO ban) actually disserves localism because it deprives local media entities of potential efficiencies to support their original newsgathering and reporting efforts.[8] That is another conclusion the Third Circuit

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[5] *UCC Opposition* at 6-7. UCC does contend elsewhere in its opposition, in a very backhanded way, that radio provides sufficient local news and information to contribute significantly to viewpoint diversity. *Id*. at 8. The evidence in the record does not, in fact, support that assertion, *see, e.g*., Joint Comments of Bonneville and The Scranton Times, L.P., MB Docket No. 14-50, *et al*., at 4 (Aug. 6, 2014) ("2014 Comments")

[6] *Prometheus Radio Project v. FCC*, 824 F. 3d. 33, 51-52 (3rd Cir. 2016) ("*Prometheus III*"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3rd Cir. 2004) ("*Prometheus I*").

[7] *Second R&O* at ¶ 166.

[8] *See*, *e.g.*, *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13753-60, ¶¶ 342-54 (2003); *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2052 ¶ 73 (2008).

accepted long ago,[9] even before the dramatic decline of newspapers' financial health became evident to all. The *Second R&O's* effort to back away from that conclusion now flies in the face of overwhelming record evidence that newspapers for years have trimmed their pages, shed journalists, and lost both revenue and readers.[10]

- **Viewpoint Diversity** – Until the *Second R&O*, the FCC had generally conceded that radio stations do not make a significant contribution to the central goal of the newspaper/broadcast ban: diversity in local newsgathering and reporting.[11] The agency's about-face on that determination is illogical and empirically unsupportable, as explained below.

The Commission's effort to justify retention of the newspaper/radio rule rests principally on two weak contentions. First, while scrambling for any facts concerning radio broadcasts of local news,[12] the FCC rests heavily on the newly articulated notion that radio stations offer opportunities for interactive "civic engagement" apparently unparalleled by other media platforms.[13] As support for that contention, the FCC relies upon one anecdote repeated

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[9] *Prometheus I*, 373 F.3d at 398-99.

[10] *See* Bonneville/Scranton Ex Parte, MB Docket No. 14-50, *et al*., at Att. B 2-3 (June 21, 2016), *citing* http://www.pewresearch.org/fact-tank/2015/04/29/5-key-takeaways-fromstate-of-the-news-media-2015/ (as of 2015, newspaper advertising revenue was less than half of what it was a decade earlier and daily circulation was down 19 percent over the same period.); *see also, e.g.*, 2014 Comments, *citing* Steve Waldman and the Working Group on Information Needs of Communities, FCC The Information Needs of Communities: The Changing Media Landscape in a Broadband Age, at 41 (July 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf ("INC Report"). The Commission's unyielding grip on the NBCO rule does not obscure the stark contradiction between its praise of newspapers as the leading source of local news and its refusal to address the implications of the industry's financial decline on newspapers' ability to serve that role. The agency could be characterized as loving the newspaper industry to death.

[11] 2012 Comments at 6-9 (tracing FCC pronouncements since 1970).

[12] In fact, the *Second R&O* recognizes in a footnote that the study it cites for local radio news statistics – as the study author himself freely admits – is *not scientifically valid* because it relies solely on self-reporting and therefore cannot be extrapolated to the entire industry. *Second R&O* at n.426; *id*. at n.427. Respondents to the survey account for just over 32 percent of stations solicited, and less than 70 percent of those responding reported airing any local news at all. *Id*. at n.426. Even for those stations, the Commission has no idea what the respondents may consider "in the category of local news," *id*., which might consist simply of local weather and traffic information provided by syndicated services.

[13] *Second R&O* at ¶ 208.

frequently over the last three years by UCC: A local Spanish radio talk show was solely credited with generating interest and participation in immigration rallies in the station's community.[14]

The "civic engagement" contention is both meritless and disingenuous. The Commission should be compelled by the record in this docket to recognize that online platforms deliver many times more opportunities for interactive "civic engagement" than any radio station could support over the air – for the agency certainly has touted the Internet's groundbreaking capacity to support interactive speech in multiple other dockets over the last decade.[15] The FCC cannot have it both ways. If interactive civic engagement truly is a goal, then the value of online platforms far outweigh radio in serving that goal, or the newly identified goal is simply not a credible one.

Second, the *Second R&O* essentially abandons the Commission's consistently identified goal for the newspaper/radio cross-ownership rule over the decades – *i.e.*, the fostering of local newsgathering and reporting. This is contrary to logic as well as history. Fostering production of local news is the only regulatory objective that could even theoretically make sense *with respect to print newspapers*.

As for the history, the NAB Petition correctly points out (and Bonneville/Scranton has noted for years) that the Commission has never had the evidence to contend that radio stations are the equal of daily newspapers in the gathering and reporting of local news.[16] And the agency

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[14] *Second R&O* at ¶ 157. The anecdote's import has been directly rebutted in the record, although the *Second R&O* fails to acknowledge it. Bonneville/Scranton cited news reports that organizers of the immigration rallies cited by UCC actually made heavy use of the Internet and other online media to stage the events. *Compare* UCC Ex Parte Disclosure, MB Docket No. 14-50, at 1 & n.1 (June 28, 2016) (citing National Hispanic Media Coalition comments dated Aug. 6, 2014) *with* Bonneville/Scranton July 2016 Ex Parte, at 2-3.

[15] *See, e.g.*, FCC, *Connecting America: The National Broadband Plan*, Chapter 15 (Mar. 10, 2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf; *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5627, n.118 and accompanying text (2015).

[16] Radio Television Digital News Association, RTDNA Research: Newsroom Staffing (Jul. 25, 2016) ("The typical (median) radio news operation had a full time news staff of one – the same as it's been since I started doing these surveys more than 20 years ago"), https://www.rtdna.org/article/rtdna_research_newsroom_staffing.

still does not do so now. Instead, it falls back on the baseless contention that any role, no matter how small, justifies continuation of the cross-ownership ban: "A lesser role does not mean that radio plays no role."[17]

This simply is not a legitimate regulatory point. The issue is that radio plays *such a minor role* with respect to original newsgathering and *such a duplicative (if not lesser) role* to the Internet/social media with respect to "civic engagement" that the FCC cannot legally justify retention of the outdated ban. The *Second R&O*'s analysis flouts the plain language of Section 202(h), which demands that the agency analyze the restrictions in the context of current marketplace conditions – and not the "hoped for" meaningful gain in diversity that motivated adoption of the original ban four decades ago, which has never delivered on that theory.[18]

The FCC's refusal to engage seriously with the implications of the Internet and online media for viewpoint diversity is indefensible and inexplicable. It becomes even more so when the agency expressly identifies interactive civic engagement as an attribute of radio that justifies the ban and yet ignores the same attribute of online media. The agency should finally jettison "a rule on the books that almost no one at the FCC actually believes makes sense any longer."[19]

II. CALLS FOR ADDITIONAL ACTION ON OWNERSHIP DIVERSITY DO NOT JUSTIFY INACTION ON THE DEMONSTRATED NEED FOR PROMPT ELIMINATION OF THE NEWSPAPER/RADIO BAN

Petitioners misread *Prometheus III* in contending that the FCC must first undertake more research toward justifying race- and gender-based ownership rules before eliminating the

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[17] *Second R&O* at ¶ 154. And even with respect to this gossamer-thin contention, the Second R&O can muster no more than conditional support. It notes "some evidence in the record that members of certain communities *may* rely more heavily on broadcast radio stations for local news and information" and reliance that "*may* be especially strong" for stations serving particular demographic groups. *Id*. at ¶ 156 (emphasis added).

[18] Ironically, the *Second R&O* even cites to the Commission's 1975 theoretical hope as support for its conditional finding today. *See id*. at ¶ 158 & n.440 (radio "may play an influential role"). After four decades of searching for evidence to back up the theory, it should be evident that the theory is insupportable.

[19] *Second R&O*, 31 FCC Rcd at 10046 (Dissent of Commissioner Pai)

newspaper/radio cross-ownership rule (or amending or repealing any other ownership regulation).[20] Rather, the Third Circuit directed the Commission to stop shying away from "mak[ing] a final determination as to *whether* to adopt a new [eligible entity] definition [based on race and gender].… We do not intend to prejudge the outcome of this analysis; we only order that it must be completed."[21] The FCC in the *Second R&O* did make that determination.[22]

Regardless of the legal issues surrounding the eligible entity definition, there is no evidence in the FCC's voluminous rulemaking record to suggest that rescinding the newspaper/radio ban would have any adverse impact on minority and female radio station ownership.[23] As Bonneville/Scranton has explained in prior filings, the number of daily papers that might seek to newly acquire radio facilities is likely to be extremely small, given the financial state of the news industry.[24] The willingness of a radio station to newly acquire a newspaper, although also likely rare, could deliver a welcome infusion of support to the print platform – and, by definition, it would not affect existing radio ownership. Moreover, as Bonneville/Scranton also has pointed out previously,[25] the sheer number of radio stations – 15,516 at the FCC's last count, and 17,194 if LPFM stations are added[26] – means that there are plenty of opportunities for minority and female would-be radio owners to enter the industry, if they can obtain the financing necessary to do so.

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[20] UCC Petition at 2-3.

[21] *Prometheus III* at 824 F.3d at 49-50 (emphasis added).

[22] See *Second R&O* at ¶¶ 234-36, 297.

[23] There also is no evidence that the ban promoted minority or female ownership.

[24] *See, e.g.*, *See*, *e.g.*, Joint Reply Comments of Bonneville International Corporation and The Scranton Times, L.P., MB Docket No. 14-50, *et al*. (Sep. 8, 2014) ("2014 Reply Comments"), at 4.

[25] *See, e.g.*, *id*. at 8-9.

[26] FCC News Release, *Broadcast Station Totals As of December 31, 2016* (rel. Jan. 5, 2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0105/DOC-342889A1.pdf

Financing remains the rub, as nearly everyone who has considered ownership diversity issues has agreed.[27] For this reason, Bonneville/Scranton has consistently urged the Commission to explore legally sustainable measures, such as an incubator program, that are targeted to address financial barriers to entry.[28] Accordingly, Bonneville/Scranton supports NAB's renewed call for that initiative[29] and urges the Commission to consider additional measures to promote minority and female ownership.

III. THE FCC MAY NOT QUICKLY DISMISS THE NEWSPAPER/RADIO BAN'S CONSTITUTIONAL INFIRMITIES UNDER ANY STANDARD OF FIRST AMENDMENT REVIEW

The decision to retain the newspaper/radio cross-ownership ban is constitutionally suspect, and the Commission should not simply assume – as the *Second R&O* does – that its action will be assessed under the rational basis standard set nearly four decades ago in *FCC v. National Citizens Committee for Broadcasting*.[30] Today's dynamic and astoundingly diverse media marketplace warrants heightened scrutiny for any ownership restraint on traditional media outlets. This is particularly true when the restraint rests solely on viewpoint diversity, a label (and a policy goal) that by definition regulates entities because of the *content* they may produce.[31]

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[27] *See*, *e.g.*, Prepared Remarks of FCC Commissioner Mignon L. Clyburn, Capital Assets Conference: Financing Minority and Women Ownership in Broadcasting (Jan. 25, 2017) ("[T]he hard, cold reality is this: A new entrant, with no existing license, has a supreme challenge when it comes to acquiring the capital necessary to seal a broadcast property deal. Compound this with being a woman or person of color, and it may seem next to impossible, to break into the business" of broadcasting.).

[28] *See, e.g.*, 2014 Reply Comments at 9.

[29] NAB Petition at 25.

[30] *Second R&O* at n.*375* (citing *FCC v. NCCB*, 436 U.S. 775, 786 (1978)).

[31] To be sure, the FCC's media ownership restraints are not "viewpoint-based" rules in the traditional constitutional sense. Nevertheless, because the agency has justified its retention of the rule on the basis of the specific content – including commentary – that particular radio stations arguably deliver, the regulation fits squarely into the modern First Amendment jurisprudence concerning content-based rules, particularly as they intersect with speaker-based

At the very least, the newspaper/radio rule should face the same intermediate scrutiny review employed in evaluating First Amendment challenges to other content-based broadcast regulations, as well as other cross-ownership bans.[32] The Commission itself conceded as much in its *1998 Biennial Review Report*, when the agency employed the intermediate scrutiny test as articulated in *U.S. v. O'Brien* in analyzing the NBCO rule during the pre-Internet era.[33] Under that standard, application of the newspaper/radio cross-ownership ban here would fail all three prongs of the intermediate scrutiny test:

1. The FCC's goal can hardly be "substantial" or "important" when so many other media and communications platforms, most of them unregulated, provide as good or better outlets for diverse speech and opportunities for civic engagement than do radio stations;[34]
2. The ban does not "directly advance" the stated purpose when so many other platforms, most unregulated, already serve the FCC's identified goal;[35]and
3. The ban is not "narrowly tailored" to serve the identified goal when so many other speakers serving the same function are not similarly constrained.[36]

Significantly, even under rational basis review the newspaper/radio rule is constitutionally infirm. This most deferential standard still requires the FCC to muster some

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distinctions. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230-231 (2015); *Citizens United v. FEC*, 558 U.S. 310 (2010).

[32] *See, e.g.*, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977); *Fox Television Stations, Inc. v FCC*, 613 F.3d 317, 326 (2d Cir. 2010) *rev'd on other grounds*. Moreover, heightened scrutiny has long applied to cable television and other non-broadcast media. When courts have reviewed media ownership restraints under intermediate scrutiny, the prohibitions have been invalidated. *See US West v. United States*, 48 F.3d 1092 (9th Cir. 1995); *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, 42 F.3d 181, 201-202 (4th Cir. 1994).

[33] *1998 Biennial Review Report – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, 11121, ¶¶ 116-118 (2000) (*quoting Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"), *citing United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[34] *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 670 (1985) (asserted government interest in ensuring "dignified" attorney advertising is insufficient); *see also Greater New Orleans Broadcasting Ass'n, Inc. v. FCC*, 527 U.S. 173 (1999).

[35] *See, e.g.*, *Reed*, 135 S.Ct. at 2231 ("Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem," *citing Cincinnati v. Discovery Network*, 507 U.S. 410, 425 (1993)).

[36] *See, e.g.*, *Bd. of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (the "fit" between means and ends must be proportionate to the interest).

"reasonably conceivable state of facts" to justify its view of today's media marketplace and its insistence the decades-old ban is still needed.[37] The record before the agency now provides no such evidence.

IV. CONCLUSION

The Commission should act upon NAB's Petition for Reconsideration by repealing the outdated newspaper/radio cross-ownership rule. UCC's Opposition to that petition offers nothing but cursory assertions that do not mask the paucity of facts in the docket to justify continuation of the restraint. In particular, because radio does not serve as a significant source of local news generally, the rule does not foster viewpoint diversity in the only way that makes sense in the newspaper context: local newsgathering and reporting. Because retention of the restraint would violate Section 202(h) of the Telecommunications Act of 1996, be arbitrary and capricious, and raise grave constitutional questions, the FCC should grant the NAB Petition.

Respectfully submitted,

BONNEVILLE INTERNATIONAL CORPORATION
THE SCRANTON TIMES, L.P.

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[37] *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993).

CERTIFICATE OF SERVICE

I, Derek Teslik, hereby certify that on February 6, 2017, a true and correct copy of the foregoing Joint Reply Comments was sent by first class mail and by electronic mail to the parties listed below. The Joint Reply Comments originally were filed via the Commission's electronic filing system on February 3, 2017.

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